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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FIDELITY NATIONAL FINANCIAL,
INC., et al.,

Plaintiffs,

vs.

NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA., et al.,

Defendants.

CASE NO. 3:09-CV-00140-GPC-KSC

Magistrate Judge Karen S. Crawford

**JOINT MOTION REGARDING
DEFENDANT'S MOTION FOR
LEAVE TO SUBSTITUTE AN
EXPERT WITNESS FOR AN
UNAVAILABLE EXPERT
WITNESS**

[Filed concurrently with Declaration of
Dean P. Felton; Declaration of Susan
Koehler Sullivan; Declaration of Steven
A. Goldfarb]

Action Filed: September 15, 2008
Trial Date: None Set

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JOINT INTRODUCTION

Defendant National Union Fire Insurance Company of Pittsburgh, Pa. (“NU”) hereby presents, in the form of a “joint motion,” its Motion for Leave to Substitute an Expert Witness for its expert, Dean Felton, and the Opposition thereto by Plaintiffs, Fidelity National Financial, Inc., Chicago Title Insurance Company and Chicago Title Company (hereinafter collectively referred to as either “FNF” or “Plaintiffs”). Plaintiffs consent to the filing of NU’s Motion in this joint format solely to avoid further delay, but strongly object to NU having belatedly submitted one version of its proposed motion to Plaintiffs on April 17, 2015, and then, after receiving Plaintiffs’ Opposition, taking nearly two weeks to rewrite and submit a new version of NU’s Motion rather than simply inserting a Reply following Plaintiff’s Opposition.

NATIONAL UNION’S STATEMENT OF POINTS AND AUTHORITIES IN
SUPPORT OF SUBSTITUTION OF ITS EXPERT WITNESS

I. INTRODUCTION

NU’s expert witness, Dean Felton, suffered a disabling heart attack. Following his doctor’s advice, he reluctantly discontinued his consulting business and withdrew as an expert in all matters with which he was involved, including the instant matter. (See Declaration of Dean Felton, ¶¶ 2-3). NU solicited FNF’s stipulation to permit the designation of a substitute expert witness, but the parties could not agree on the terms. Under these unfortunate and unforeseeable circumstances, NU hereby requests leave to designate a substitute expert witness to replace Mr. Felton.

The substitution of another expert – who will testify within the same scope and substance of Mr. Felton’s opinions, but pursuant to his own analysis of the case and in his own words – will fairly restore NU to its position prior to Mr. Felton’s incapacitation. NU has already proposed to FNF that the substitute expert would be subject to the same limitations on the scope of his testimony as Mr. Felton would have been. Given NU’s agreement to limit the scope of the substitute expert’s testimony, FNF’s primary basis for objection to NU’s request appears to be that it should have been made sooner. However, substituting experts sooner would have made no sense. When NU learned of Mr. Felton’s incapacity, the parties’ cross-motions for summary judgment were pending, the case was essentially in suspense, and there was no reason to replace him immediately. As FNF notes, the substitution of an expert requires time and expense – all of which might have been obviated or limited by the court’s summary judgment rulings, the subsequent motion for reconsideration, and the parties’ settlement discussions.

When FNF asserts that NU delayed, FNF is essentially arguing that NU should have organized some type of “fire drill” before this court completed its analysis of the competing motions for summary judgment, and before it was determined that this case could not be resolved by settlement. Had NU done so, the Court may well have

1 treated such motions as premature. On the other hand, once it appeared that the case
2 would progress to trial, and that the time and expense of substituting an expert who
3 could testify at trial would be necessary, NU notified FNF that it would seek to do so.

4 Moreover, NU has now notified FNF of the identity of the proposed substitute
5 expert, and has advised that the substitute expert has indicated that he would be able
6 to provide his expert report by June 30, 2015, and that he would be available for
7 depositions thereafter at a location convenient to plaintiff's counsel. As a result, FNF
8 cannot demonstrate any prejudice from the substitution, apart from the fact that it (and
9 NU) will need to incur some additional expert, deposition, and attorneys' fees.

10 Similarly, FNF does not and cannot cite any authority denying substitution on these
11 facts.

12 Under the facts extant here, the denial of NU's right to present expert testimony
13 at trial would irreparably prejudice NU by permitting FNF to proffer un rebutted
14 expert witness testimony on several critical issues, simply because NU suffered the
15 incapacitation of its original expert. NU therefore respectfully requests permission to
16 substitute an expert in place of Mr. Felton.

17 **II. RELEVANT BACKGROUND FACTS**

18 On July 15, 2011, NU designated Dean Felton as an expert on fidelity bonds,
19 claims handling, and bad faith, and Chris Money on escrow transaction losses. Mr.
20 Felton evaluated the coverage issues presented by FNF's claim, and opined on the
21 reasonableness of NU's handling and investigation of the claim. (See Exhibit 4 to
22 ECF No. 326-4.)

23 On March 9, 2012, the parties filed cross-motions for summary judgment and
24 *Daubert* motions. The Court ruled on the *Daubert* motions on March 28, 2014. (ECF
25 No. 420). The Court ruled on the summary judgment motions on September 30, 2014.
26 (ECF No. 427). In its *Daubert* ruling, the Court acknowledged the role of the claims
27 handling experts, stating that: "[T]his is not a simple case. The jurors may not be
28 familiar with fidelity bonds. The testimony of claims handling experts, like Amoruso,

1 Haley, and Felton, will help the jury understand the best practices to handle fidelity
2 insurance claims. The adjustment of a complex claim like the Norton fraud is not self-
3 evident to a layperson.” (ECF No. 420, 16:6-10.) The Court continued, “Such an
4 expert can inform the jury about the industry standards based on his experience and
5 knowledge of the insurance industry.” (ECF No. 420, 16:17-19.)

6 On or around May 16, 2014, after the *Daubert* ruling and while the cross-
7 motions for summary judgment were still pending, counsel for NU was informed by
8 Mr. Felton that he had suffered a heart attack in February 2014. Mr. Felton further
9 informed counsel for NU that he could no longer serve as its expert, and that he was
10 withdrawing from all matters. (Felton Dec., ¶¶ 2-3.)

11 On September 30, 2014, the Court denied NU’s motion for summary judgment
12 and granted FNF’s partial motion, finding liability for breach of contract and bad
13 faith. (ECF No. 427.) On October 28, 2014, NU timely filed a motion for
14 reconsideration which, among other things, requested reconsideration of the Court’s
15 granting of plaintiff’s motion for partial summary judgment on the issue of bad faith.
16 The Court set hearing for the motion for reconsideration on February 6, 2015.

17 On October 21, 2014, the parties were ordered to attend a Mandatory
18 Settlement Conference set for December 2, 2014. (ECF No. 428.) The parties were
19 unable to resolve the case at the Mandatory Settlement Conference, and a scheduling
20 order was subsequently entered setting an April 17, 2015 deadline for “pretrial”
21 motions (other than *Daubert* motions which had already been required and ruled upon
22 and motions *in limine*). (ECF No. 435.)

23 Following oral argument, on February 19, 2015, the Court issued an order
24 denying NU’s motion for reconsideration, including as to bad faith. (ECF No. 439.)

25 On March 31, 2015, during a meet and confer relating to the “pretrial” motions,
26 NU requested that FNF stipulate to permit NU to replace Mr. Felton as an expert, or
27 otherwise not object to the replacement of Mr. Felton. Ultimately, FNF declined to
28 stipulate to substitution of a new expert for Mr. Felton. (Declaration of Susan

1 Sullivan, ¶(3).

2 **III. ARGUMENT**

3 NU hereby seeks leave to replace its expert on the grounds that good cause
4 exists to amend the scheduling order to permit this substitution, and that the requested
5 relief is substantially justified and harmless pursuant to Federal Rules of Civil
6 Procedure 16(b)(4), 26(a)(2), and 37(c). NU is entitled to a fair defense at trial which
7 here must include the right to present live, affirmative expert testimony on the matters
8 upon which Mr. Felton had been designated, and in rebuttal to FNF's coverage and
9 claims handling experts. Anything less else would amount to grave injustice,
10 rendering the trial intrinsically unfair. For the reasons set forth below, NU
11 respectfully requests that this Court grant its request for leave to substitute an expert
12 in place of Mr. Felton.

13 **A. Good Cause Exists To Allow NU Leave to Re-designate Its Expert.**

14 For good cause, the scheduling order may be modified with the court's consent.
15 Fee. R. Civ. Proc. 16(b)(4). Good cause exists if the pretrial schedule cannot
16 "reasonably be met despite the diligence of the party seeking the extension."¹
17 Similarly, Fed. R. Civ. Proc. 37(c) permits an untimely disclosed witness if there is
18 substantial justification *or* the failure was harmless. Fed. R. Civ. Proc. 37(c). Good
19 cause exists and substantial justification exists under the circumstances presented
20 here.

21 1. Substitution will restore NU to the same position it was in prior
22 to Mr. Felton's heart attack.

23 Courts have consistently permitted the substitution of expert witnesses under
24 _____

25 ¹ *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992); *see also*
26 *Wong v. Regents of the University of California*, 410 F.3d 1052, 1060 (9th Cir.
27 2005) ("[d]eadlines must not be enforced mindlessly" because a good reason may
28 exist to permit an identification of additional witnesses after the established
deadline.").

1 Rule 16(b)(4) when unforeseen events render the original expert witness unavailable
 2 to testify at trial.² Likewise, Courts have routinely found that an expert's death or
 3 disability provides substantial justification for substitution of an expert witness via an
 4 untimely designation.³

5 As FNF acknowledges, the purpose of this substitution is to put the movant in
 6 the same position as it was prior to the need for substitution. But this only means that
 7 the substitute expert is "generally restricted to the same subject matter as the prior
 8 expert." *TIC*, 2012 WL 2830867, at *9 (quoting *Lincoln*, 2010 WL 3892860, at *2).
 9 Contrary to FNF's implication, the substituted expert is not required to adopt the
 10 original expert's report and speak with the original expert's words. "Rather, the
 11 substitute expert should have the opportunity to express his opinions in his own
 12 language after reviewing the evidence." *Id.*

13
 14 ² *Whiteside v. State Farm Fire & Cas. Co.*, 2011 WL 5084981, at *1 (E.D. Mich.
 15 Oct. 26, 2011); *TIC - The Indus. Co. Wyoming v. Factory Mut. Ins. Co.*, 2012 WL
 16 2830867, at *8 (D. Neb. July 10, 2012); *Lincoln Nat. Life Ins. Co. v. Transamerica*
 17 *Financial Life Ins. Co.*, 2010 WL 3892860, at *2 (N.D. Ind. September 30, 2010)
 18 (allowing substitution where, during the pendency of the case, the expert was
 19 criminally convicted and incarcerated); *Doctor's Associates, Inc. v. QIP Holder*
 20 *LLC*, 2009 WL 5184404, at *4 (D. Conn. 2009) (allowing substitution due to the
 21 expert's conflict of interest).

19 ³ *Brooks v. County of San Joaquin*, 2012 WL 5928416, at *1 (E.D. Cal. Nov. 26,
 20 2012) ("Courts have approved supplemental disclosures where a critical expert
 21 witness has died after the deadlines have passed for expert discovery disclosure.")
 22 *See, e.g., Morel*, 259 F.R.D. at 20 ("the late disclosure is substantially justified
 23 because a critical expert witness died after the deadlines for discovery had passed.");
 24 *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 240 F.3d 1, 9 (1st Cir. 2001)
 25 (upholding substitution three months before trial when necessitated by the previous
 26 expert's death); *Baumann*, 278 F.R.D. at 615 (late disclosure of expert was
 27 "substantially justified because of [the expert's] untimely and unexpected death");
 28 *Manindra Mill. Corp. v. Ogilvie Mills, Inc.*, 1991 WL 205691, at *2 (D. Kan. Sept.
 23, 1991) ("under the unique circumstances of this case arising from the death of
 [defendant]'s original expert witness, [the defendant] should be allowed to present
 testimony of a substitute witness."); *Howard v. Securitas Sec. Servs., USA, Inc.*,
 Case No. 08-2746 (N.D. Ill. June 23, 2011) (finding substantial justification to
 substitute party's expert after the disclosure deadline where original expert witness
 was recovering from leukemia).

1 FNF claims there is “ample authority” limiting NU’s substitute expert to
2 “endorsing and defending Mr. Felton’s surviving opinions,” but neither of the
3 nonbinding cases it cites set forth such a rule. The first case FNF cites, *In re Rail*
4 *Freight*, does not even involve a substitute expert. There, the plaintiff class learned
5 that its class certification expert, Mr. Rausser, had “for years, consulted with and
6 invested in companies that buy out class actions claims for profit.” *In re Rail Freight*
7 *Fuel Surcharge Antitrust Litig.*, 2014 WL 6684794, at *1 (D.D.C. Nov. 26, 2014).
8 Plaintiffs therefore moved, not for the “straight substitution of one expert for another,”
9 but “for leave to file a supplemental expert report, limited in scope, to attest to the
10 integrity and reliability of Rausser’s expert analysis and methodologies.” *Id.* In short,
11 class plaintiffs sought a second expert to bolster the opinion of its original, conflicted
12 expert. The court’s language, relied on by FNF as, “confining [the supplemental
13 expert’s] opinion to the reliability, integrity, and accuracy of [the] prior expert’s
14 work” had nothing to do with the role of a substitute expert – it was the plaintiffs’
15 own proposal for the scope of testimony for its requested “supplemental” expert. *In*
16 *re Rail Freight* therefore provides no authority for FNF’s aggressive effort to unduly
17 limit the opinions and testimony of NU’s substitute expert.

18 The second case relied upon by FNF, *Doctor’s Associates*, is also vastly
19 different from this case. *Doctor’s Associates* involved a motion for costs and
20 expenses rather than a motion to substitute an expert. *Doctor’s Associates*, 2009
21 WL 5184404 at *1 (D. Conn. December 23, 2009). There, Subway signed an
22 engagement letter with a consulting firm, Willamette, to retain Dr. Schacter as a
23 damages expert. *Id.* at *1. Thereafter, Dr. Schacter was recruited by another
24 consulting firm that was an independent auditor for Subway, and was conflicted out.
25 *Id.* at *2. The court approved the substitution of Mr. Schweih, another Willamette
26 employee, but Schweih’s report “concluded that Subway suffered an additional \$1.7
27 million in damages.” *Id.* at *3. Quiznos then brought a motion to recoup its costs
28 and expenses incurred in rebutting the conclusions of Dr. Schacter’s report, on the

1 grounds that Subway's untimely substitution rendered its rebuttal worthless. *Id.*
 2 The court denied the motion because it had approved the substitution, but noted that
 3 it did not know *Subway had engaged Willamette, not Dr. Schacter individually*, and
 4 thus "Willamette could simply have assigned another expert to Subway's case in
 5 order to support the conclusions reached in Dr. Schacter's original report." *Id.*
 6 Because Subway attempted to take advantage of the substitution by substantially
 7 changing and increasing its damage claim, the court ordered "that the new expert's
 8 testimony at trial will be limited to establishing the veracity and integrity of the
 9 original expert report and the conclusions reached in the original expert's report."
 10 *Id.* at *5, *1.

11 Neither of the cases cited by FNF support its attempt to circumscribe NU's
 12 proposed substitute expert's opinion to the four corner's of Dean Felton's reports.
 13 *At trial, Dean Felton's testimony would not have been limited to exactly what he*
 14 *wrote in his reports or exactly what he stated in deposition*, yet FNF suggests that
 15 NU's proposed substitute expert should be constrained in this way. There is no
 16 authority supporting such a limitation here. Rather, *the substitute expert should be*
 17 *permitted to testify the same extent that Dean Felton would have been permitted to*
 18 *testify*. This motion seeks only to place NU in the same position as it was prior to
 19 Mr. Felton's heart attack, not to place NU in a better position as FNF asserts, but
 20 certainly to avoid placing NU in an untenable, and unjust position.

21 2. NU's request for substitution is timely.

22 NU complied with the original Scheduling Order in providing timely expert
 23 disclosures. This request is required solely because of Mr. Felton's heart attack and
 24 resulting inability to testify at trial, which has yet to be scheduled.

25 In 2014, when Mr. Felton advised counsel for NU of his incapacity, the parties
 26 were awaiting the Court's order on the cross-motions for summary judgment, which
 27 specifically sought adjudication of the bad faith claim. Accordingly, there was no
 28 reason to attempt to obtain a new expert pending a determination of the claim for

1 which Mr. Felton had been retained as an expert. When the case is essentially “in
2 suspense,” a party is not expected to seek permission to substitute an expert witness.⁴

3 After the Court ruled against NU on the issue of bad faith, NU promptly moved
4 for reconsideration. In the meantime, the parties attended the court ordered
5 mandatory settlement conference in December 2014. NU’s motion for
6 reconsideration was denied in February 2015.

7 Only after the final disposition of the summary judgment motions and the
8 unsuccessful conclusion of settlement negotiations was the case was no longer in
9 suspense, and likely to progress to trial. At that point, it was reasonably clear that a
10 substitute expert would need to be designated to testify at trial, and the parties
11 scheduled a meet and confer telephone conference in March 2015, during which NU
12 advised FNF that it would need to substitute a new expert for Mr. Felton, and
13 requested FNF’s stipulation.

14 FNF has declined to stipulate to a substitute expert. However, since the
15 deadline to file motions *in limine* has not yet been set, and in any event will not occur
16 until approximately September 2015, there is more than enough time for FNF to
17 depose the substitute expert in advance of trial. More significantly, refusing NU’s
18 request to substitute an expert where Mr. Felton’s medical condition prevents him
19 from acting as such would be fundamentally unfair.

20 In addition, FNF’s cited authorities purported in support of denial due to delay
21 (*Nijjar*, *LNC Investments* and *Pfizer*) are inapposite and do not control. The
22 unpublished, nonbinding cases FNF cites involve failure to abide by existing
23

24 ⁴ See, e.g., *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 20 (D.P.R. 2009)
25 (defendant was not expected to substitute a new expert following the death of its
26 disclosed expert during stay of action); *Abbott v. Lockheed Martin Corp.* 2014 WL
27 6613148, at *2 (S.D. Ill. Nov. 21, 2014) (“defendant was not expected to substitute
28 new expert when “the contours” of the case were unclear until the time plaintiff
finalized its theories of liability).

1 scheduling deadlines, or inaction culminating in a substitution motion on the eve of
2 trial, or both. Those circumstances are entirely absent here.

3 In *Nijjar*, Plaintiff first learned his expert was irreparably conflicted at
4 deposition, but let the expert discovery period lapse with no attempt to substitute
5 until approximately 6 weeks later. *Nijjar v. General Star Indem. Co.*, 2014 WL
6 271630, at *1-*2 (C.D. Cal. Jan, 23, 2014). The court found a lack of reasonable
7 diligence, primarily because it was “apparent that Plaintiff did not adequately vet”
8 his expert, which “would have uncovered the conflict and prevented the delay
9 leading to the instant motion.” *Id.* at *2. The court also found fault with Plaintiff’s
10 failure to abide by the existing expert discovery deadlines, despite having “more
11 than a week to seek leave of the court to designate another expert prior to the expert
12 discovery cutoff.” *Id.* at *3. Finally, contrary to FNF’s assertion that “there was no
13 trial date set in *Nijjar*,” the court noted that reopening expert discovery would
14 “result[in] postponement of trial,” which would in turn prejudice the non-moving
15 party and the court. *Id.*

16 Here, NU did not carelessly retain an irreparably conflicted witness. Nor did
17 NU neglect any expert discovery deadlines. Mr. Felton’s heart attack occurred well
18 after all such deadlines expired, and NU raised its request for substitution with FNF,
19 and subsequently with this Court, once it became reasonably clear that an expert
20 who could testify at trial was necessary and that FNF would not stipulate to same.
21 Lastly, there is no trial date set, and thus no need for postponement. As a result,
22 *Nijjar* does not support denial of a substitute expert here.⁵

23
24 ⁵ FNF’s supplemental cite to *Jones* is similarly unhelpful. The entirety of its
25 analysis of the substitution issue is less than two sentences, and indicates only that
26 the party seeking substitution did nothing for 7 months in the face of an impending
27 trial. *Jones v. DeVaney*, 107 Fed. Appx. 709, 711 (9th Cir. 2004). Here, there is no
28 impending trial, and thus there is adequate time to conduct the necessary expert
discovery.

1 FNF's reliance on *LNC Investments, Inc. v. First Fidelity Bank*, 2000 WL
2 1290615 (S.D.N.Y. Sept. 12, 2000), is also misplaced. Contrary to FNF's assertion,
3 *LNC* does not stand for the proposition that "awaiting a court's ruling on a motion
4 before raising the issue of expert substitution constitutes imprudence." There,
5 defendants' expert retired from his practice due to a stress-related heart condition in
6 August 1998, shortly after trial and while the case was on appeal. *Id.* at *1-*2. The
7 appellate court reversed and remanded, and re-trial was set for April 2000, then re-
8 set for September 2000, but at no point did defendants contact their expert to
9 ascertain his availability for re-trial. *Id.* at *2-*3. It was defendants' delay in
10 contacting their own expert, not in seeking to substitute, that the court labeled
11 "imprudent." *Id.* at *3.

12 Instead, defendants waited until their motion to exclude opposing experts was
13 denied, on July 24, 2000. *Id.* at *2. On August 4, 2000, about one month before
14 trial, defendants finally learned that their expert had retired. *Id.* They nevertheless
15 still failed to move the court for substitution by the pretrial motion deadline of
16 August 15, instead filing letters with the court two weeks before trial. *Id.* at *3. The
17 court denied the defendants' motion to substitute, ruling that "inquiry should have
18 been made in advance of the late April date originally selected for the second trial."
19 *Id.* It was the defendants' "inaction" despite rapidly approaching trial dates, and the
20 resulting disruption of plaintiffs' trial arrangements on the eve of trial, which the
21 court found justified denial of the motion to substitute. *Id.* at *4.

22 Here, NU sought substitution when it became apparent that resolution of the
23 case short of trial was not reasonably likely. The *LNC* court's analysis is inapposite.
24 NU was not inexcusably ignorant of its expert's availability in the face of an
25 impending trial date, and its substitution request at this point will not inconvenience
26 FNF beyond that occasioned by any substitution, nor does it require the continuance
27
28

1 of a trial date.⁶ To the contrary, there is adequate time to conduct the necessary
2 expert discovery prior to the August 2015 pretrial conference. As a result, the
3 analysis in *LNC* is inapposite.

4 Finally, *Pfizer* does nothing to support FNF's claim that "many other
5 circumstances" support denial. There, one of IVAX's experts, Dr. John P. Long,
6 died on June 10, 2007, a fact of which IVAX was aware. *Pfizer, Inc. v. IVAX*
7 *Pharmaceuticals, Inc.*, 2009 WL 1885100, at *1 (D.N.J. June 29, 2009). In
8 February 2009, the court set a trial date of June 16, 2009, but IVAX did not seek
9 substitution until May 8, 2009 – one month after the completion of expert discovery
10 and approximately five weeks before trial. *Id.* at *1-*2. The court denied the
11 motion because IVAX had "knowledge of Dr. Long's death since June 2007" could
12 have sought substitution "long before the close of expert discovery," but instead
13 made its motion "only five weeks before the original trial date" as an "eleventh hour
14 request" in "flagrant disregard" of the scheduling order." *Id.* at *3.

15 Here, NU first learned of Mr. Felton's heart attack long after the expert
16 discovery deadline had expired. And far from disregarding the court's scheduling
17 order, NU sought to file this motion on the assigned April 17 date for pretrial
18 motions. Moreover, NU's request for substitution cannot be categorized as
19 "eleventh hour." NU notified FNF of its need for substitution as soon as it became
20 reasonably likely, in March 2015, that trial would proceed and a substitute expert
21 would be required to replace Mr. Felton. In addition, this motion was filed only
22 after the parties exhausted their efforts to resolve the issue informally, but well
23 before any potential trial date. *Pfizer* does not support FNF's efforts to unlevel the
24 playing field.

25
26 ⁶ Although it does not believe that a continuance is required, NU has not objected to
27 FNF's request for a three-month continuance to avoid any inconvenience occasioned
28 by the expert substitution.

1 **B. NU's Re-designation Will Not Prejudice FNF.**

2 If unable to present live expert testimony to explain the handling of the instant
3 claim under its fidelity bond, NU would be unjustly and irreparably prejudiced.⁷ This
4 Court has acknowledged that the facts of this case are complex, sophisticated, and
5 beyond the realm of layman understanding, and that some amount of expert testimony
6 will be appropriate. FNF disclosed two experts to opine on NU's investigation and
7 handling of the claim. Should NU be precluded from presenting expert testimony to
8 rebut the opinions of FNF's experts, the playing field will not be level. Rather, NU
9 will be unfairly prevented from presenting a full defense at trial.

10 On the other hand, should NU be granted leave to substitute an expert for Mr.
11 Felton, FNF will not be prejudiced. The pretrial conference is scheduled for August
12 21, 2015, and there is no deadline for motions *in limine* or a trial date. Accordingly,
13 there is sufficient time to provide FNF with the substitute expert's report and to
14 depose the substitute expert prior to trial.⁸ This is particularly true here as NU has
15 disclosed the name of its substitute expert, advised that it would submit a report by
16 June 30, 2015, and further advised that the expert will be available for deposition
17 thereafter.

18
19 ⁷ See *Manildra*, 1991 WL 205691, at *2 ("The court further finds that the testimony
20 of an expert witness ... is critical to many issues in this case. Thus, the court finds
21 that to prevent [defendant] to present such testimony could result in manifest
22 injustice."); *Lennane v. Am. Zurich Ins. Co.*, 2015 WL 882372, at *7 (E.D. Cal.
Mar. 2, 2015) (declining to exclude untimely plaintiff expert designation because
"plaintiffs' reliance on this expert is a crucial element of their case").

23 ⁸ See *Guerra v. Paramo*, 251 F. App'x 424, 425 (9th Cir. 2007) (upholding district
24 court's discretion to allow a *new* expert designation, explaining that there was no
25 "ambush" at trial where trial was five months away); *Manildra*, 1991 WL 205691 at
26 *2 (preventing the defendant from replacing a deceased expert could result in
27 manifest injustice is especially true where the court could attempt to accommodate
28 the party's effort to find a substitute expert witness); *Scardine v. Estate of Fleming*,
2014 WL 2918420, at *4 (D. Mont. 2014) (concluding that "the exclusionary
sanction of Rule 37(c) is not appropriate under the circumstances" where the late
disclosure would not disrupt the schedule and would not provide any unfair
advantage).

1 Moreover, FNF will suffer no prejudice because NU's substitute expert will be
2 "generally restricted to the same subject matter as the prior expert." *TIC*, 2012 WL
3 2830867, at *9 (quoting *Lincoln*, 2010 WL 3892860, at *2), any attempt by NU to add
4 to Mr. Felton's opinions would exceed that parameter and would arguably be subject
5 to motion *in limine*. *Baumann*, 278 F.R.D. at 616. Accordingly, in no event does the
6 substitution of an expert for Mr. Felton somehow unlevel the playing field for FNF.
7 Failure to permit the substitution, however, irreparably prejudices NU.

8 **IV. CONCLUSION**

9 As noted above, the loss of National Union's expert was unforeseeable and FNF
10 will suffer no prejudice by the substitution of the expert. Moreover, NU has promptly
11 moved for the substitution of this expert once it became apparent that bad faith would
12 remain in issue, and this case could not otherwise be resolved. Accordingly, NU
13 respectfully requests that the Court grant it leave to substitute a new expert in the
14 place of Mr. Felton.

**PLAINTIFFS' STATEMENT OF POINTS AND AUTHORITIES IN
OPPOSITION TO SUBSTITUTION OF NU'S EXPERT WITNESS**

I. INTRODUCTION

NU's motion to substitute a new bad faith and claims handling expert for Dean Felton should be denied because (i) it is a disguised attempt to designate a *better* expert and (ii) NU lacks the required good cause. NU's motion mischaracterizes Plaintiffs' position by improperly suggesting that the parties agree on appropriate limitations to the substitute's report and trial testimony when there is a clear disagreement. Besides seeking a new and better expert, unconstrained by the Court's rejection of virtually all of Mr. Felton's opinions, NU resorts to fiction in arguing that it has established good cause for a substitute. NU suggests that it diligently raised its need for a substitute when, in truth, NU intentionally and inexplicably delayed doing so to cause Plaintiffs the very significant prejudice which NU now trivializes.

Contrary to NU's contentions, had Mr. Felton not become medically incapacitated, he would have been limited by applicable law to testifying at trial only regarding the few opinions he timely disclosed that survive, among others, this Court's *Daubert*, summary judgment, and reconsideration r. Under these circumstances, Mr. Felton certainly would not have been permitted to issue a new expert report with new or different opinions, even if they were within the same "scope" of his original or rebuttal report. Ironically, NU concedes that "any attempt to add to Mr. Felton's opinions would exceed" even what it claims is a proper limitation on the scope of a substitute expert. (Mot. at 14:1-5.) But, rather than agree to appropriate limitations on its proposed substitute expert's report, opinions, and testimony at trial, NU seeks to avoid any real limit by suggesting only that its violation of this "parameter" would "*arguably* be subject to a motion in limine." (*Id.* (italics added.)) If NU agrees—as it states—that its proposed substitute expert should be limited to the same opinions that Mr. Felton could still

1 give a trial, then it should have agreed to Plaintiffs' offer to stipulate to a substitute
2 expert whose report and testimony at trial will be limited to Mr. Felton's opinions
3 that survived the Court's orders listed above. The Court should not allow NU's
4 attempted "do-over" with complete disregard for the law of the case at this late
5 stage.

6 Were NU seeking only a true substitute for Mr. Felton, good cause would exist
7 only *if* NU had exercised good faith and diligence in raising the issue, and only *if* the
8 untimely proposed substitution would not prejudice Plaintiffs. But NU fails to meet its
9 burden to establish either of these elements.

10 First, NU is dilatory in bringing this motion because it failed to disclose Mr.
11 Felton's incapacity for nearly a year after learning of it, including remaining silent for
12 *six months* after the Court's September 30, 2014 summary judgment order; failing to
13 raise it at the December 2, 2014 Mandatory Settlement Conference, when Magistrate
14 Judge Crawford set firm pretrial deadlines, including an April 17, 2015 deadline for
15 the filing of all motions other than motions *in limine*; and waiting *six more weeks* after
16 the Court denied its reconsideration motion. NU's cavalier characterization of the case
17 as being in "suspense" until March 30, 2015 is a fallacy that ignores that all of the
18 work arising out of a substitute expert could have been completed during the six
19 months between the Court's summary judgment ruling (on September 30, 2014) and
20 NU's belated disclosure of Mr. Felton's incapacity (on March 30, 2015). That did not
21 happen only because NU intentionally failed to disclose its expert problem and, if NU
22 is to be believed, even failed to seek out a potential substitute until May 2015. Even
23 now, while NU has finally identified a proposed substitute expert, it does not plan to
24 disclose the proposed substitute expert's report and opinions until June 30, 2015.

25 Second, NU's delay in seeking substitution will significantly prejudice
26 Plaintiffs, requiring them to shift in July and August 2015 from their enormously
27 time-consuming pretrial and trial preparation to evaluating and responding to a new
28 expert report and engaging in expert depositions. The two tasks cannot physically be

1 managed simultaneously without severely compromising the quality of both, thereby
 2 resulting in extreme prejudice to Plaintiffs. Denial of NU's motion, on the other hand,
 3 will cause only minimal prejudice to NU—all of its own making—because nearly all
 4 of Mr. Felton's disclosed opinions have already been rejected by the Court, and he
 5 would never have been permitted to offer them at trial if he had not become
 6 incapacitated.

7 For these reasons, the Court should deny NU's motion. But, if the Court is
 8 nonetheless inclined to grant NU some relief, it should minimize the prejudice to
 9 Plaintiffs by (1) limiting the substitute expert's report and trial testimony to only the
 10 specific opinions disclosed by Mr. Felton, as further restricted by the Court's *Daubert*,
 11 summary judgment, reconsideration, and other rulings; and (2) delaying the final
 12 pretrial hearing and all pretrial deadlines by three months from when NU produces the
 13 substitute expert's report.

14 **II. RELEVANT BACKGROUND FACTS**

15 **A. The Court's Orders Significantly Restricted The Disclosed** 16 **Opinions That Mr. Felton Could Have Presented At Trial If He** 17 **Were Not Incapacitated**

18 Plaintiffs filed this action nearly seven years ago, on September 15, 2008, for
 19 NU's bad faith claims handling and wrongful denial of insurance coverage under a
 20 Financial Institution Bond ("FIB") that covered losses in the millions of dollars that
 21 Plaintiffs incurred from lawsuits related to a real estate Ponzi scheme. (Dkt. No. 1.)
 22 Almost three years later, on the May 5, 2011 deadline for expert disclosures, NU
 23 identified Mr. Felton as its bad faith claims handling expert, while Plaintiffs identified
 24 Peter Haley and Paul Amoroso as their bad faith claims handling experts. (Decl. of
 25 Steven A. Goldfarb ("Goldfarb Decl.") ¶2, Exs. 1 & 2.)

26 The parties' experts each provided simultaneous initial reports on July 15,
 27 2011, and simultaneous rebuttal reports on January 27, 2012. (Goldfarb Decl. ¶3.) Mr.
 28 Felton's initial report was fifty-five pages long, and contained ten numbered opinions
 which the Court later excluded or rejected in, among others, its *Daubert*, summary

1 judgment, and reconsideration rulings (which are attached as Exhibits 17-19,
2 respectively, to the Goldfarb Declaration). Mr. Felton's opinions related to:

- 3 ▪ The elimination of Plaintiffs' losses by "other insurance" (Nos. 1 & 10);
- 4 ▪ The viability of NU's Discovery and Termination defenses (Nos. 2-5);
- 5 ▪ The quality and effect of Plaintiffs' Proofs of Loss, including their impact
- 6 on NU's "investigation" (Nos. 6 & 8);
- 7 ▪ Whether direct loss applies only to a claimant's money paid into escrow
- 8 (No. 7);
- 9 ▪ And a catch-all opinion, which included sub-opinions such as that NU's
- 10 investigation and claims handling were reasonable, and that genuine
- 11 disputes existed as to coverage and the amount of the loss, all of which
- 12 he opined precluded a finding of bad faith (No. 9).

13 (*Id.* ¶3, Ex. 3; Appendix in Supp. of Pl.'s Opp. ("App.") at i-vi.)⁹

14 Mr. Felton's rebuttal report was fifty-pages long, and contained thirteen
15 numbered opinions (Rebuttal Opinions Nos. 1-12 and Coverage Opinion No. 1) that
16 substantially overlapped with his original excluded or rejected opinions, including:

- 17 ▪ The futility of comparing NU's FIB claim investigation with the
- 18 investigation of Plaintiffs' claim under NU's Miscellaneous Professional
- 19 Liability policy ("MPL") (No. 2);
- 20 ▪ The reasonableness of NU's investigation and claims handling (Nos. 3, 5
- 21 & 12);
- 22 ▪ The sufficiency of Plaintiffs' Proofs of Loss (Nos. 6, 9 & 11);
- 23 ▪ The reasonableness of NU's pre-litigation refusal to mediate in May/July,
- 24 2008 (Nos. 7 & 8);
- 25 ▪ NU's classification of the claim only as "employee dishonesty," not as
- 26 "forgery" under the FIB's insuring agreements (No. 10);

27
28 ⁹ The Appendix is attached at the end of the joint motion.

1 ▪ The applicability of the genuine dispute doctrine (No. 11);
 2 ▪ And the lack of evidence supporting coverage of the claim from July
 3 2006-February 2011 (Coverage No. 1).
 4 (*Id.* ¶3, Ex. 4; App. at vii-xii.) Mr. Felton’s rebuttal report also contained two other
 5 general opinions—that Plaintiffs and NU had “equal bargaining power” (No. 1),
 6 and that on-the-job training of a claims adjustor is acceptable in the insurance
 7 industry (No. 4). (App. at i-xii.) The former was rendered irrelevant by the Court’s
 8 summary judgment’s ruling, while the latter has not been expressly addressed by
 9 the Court. (*Id.*)

10 Plaintiffs deposed Mr. Felton on February 15, 2012, for more than six hours,
 11 resulting in a 240-page deposition transcript. (Goldfarb Decl. ¶4.) Reviewing and
 12 analyzing Mr. Felton’s reports, working with Mr. Haley and Mr. Amoruso to rebut
 13 Mr. Felton’s initial report, and preparing for and deposing Mr. Felton essentially
 14 consumed key members of Plaintiffs’ trial team nearly full time for several months.
 15 (*Id.* ¶5.) These tasks as to Mr. Felton required hundreds of billable hours, and
 16 hundreds of thousands of dollars in attorney and expert fees. (*Id.*) Expert discovery
 17 finally closed three years ago, on February 24, 2012. (Dkt. No. 311.)

18 In March 2012, the parties filed cross-motions for summary judgment, and
 19 Plaintiffs also filed a *Daubert* motion to exclude, among other of NU’s experts,
 20 Mr. Felton. (Dkt. Nos. 324-326.) This Court partially granted the motion to
 21 exclude Mr. Felton, holding in its March 28, 2014 Order that he was not qualified
 22 to—and could not—give opinions concerning the impact of “escrow transactions,
 23 banking laws, and fraud” on Plaintiffs’ claim, or whether Plaintiffs had satisfied
 24 any of their losses through payments from “other insurance” policies. (Dkt. No.
 25 420 at 7-8.) The Court then held that Mr. Felton could not base his opinion that NU
 26 conducted a reasonable investigation on excluded evidence, including the post-
 27 litigation investigation conducted by NU’s damages expert, Christopher Money,
 28 and NU’s August 2011 “coverage” letter. (*Id.* at 2-4.) The Court also excluded Mr.

1 Felton’s “formal proof of loss” opinion—that NU did not have a duty to investigate
2 the FIB claim until Plaintiffs submitted a properly executed Proof of Loss form—
3 because it contradicted applicable California insurance regulations and was based
4 on non-existent “defamation” concerns. (*Id.* at 2-6.) In a separate order shortly
5 afterwards, the Court held that Mr. Felton could not rely on the privileged liability
6 analysis memorandum prepared by Plaintiffs’ *Cumis* counsel and produced to NU
7 under regulations applicable to the separate MPL policy. (Dkt. No. 423 at 19-20.)

8 On September 30, 2014, the Court denied NU’s motion for summary
9 judgment, and granted Plaintiffs’ motion for partial summary judgment, finding
10 NU liable for breach of contract and bad faith. (Dkt. No. 427.) In doing so, the
11 Court rejected nearly all of Mr. Felton’s surviving opinions as a matter of law. (*See*
12 App. at i-xii.) Setting the case for a December 2, 2015 mandatory settlement
13 conference, the Court directed the parties to prepare for trial on compensatory and
14 punitive damages. (Dkt. No. 427 at 86.) When the parties were unable to agree
15 upon a settlement, the Court established firm deadlines for detailed pretrial filings
16 leading up to a final pretrial hearing scheduled on August 21, 2015. (Dkt. No. 435
17 at 2.) The Court later declined to reconsider summary judgment, including with
18 respect to NU’s liability for bad faith, reiterating that the totality of the
19 circumstances left no genuine dispute of material fact on this point. (Dkt. No. 439
20 at 8-9.) Accordingly, at trial, while Mr. Felton would not have been able to offer
21 testimony regarding opinions that were excluded or rejected by the Court,
22 Plaintiffs’ claims handling and bad faith experts remain admissible to explain to
23 the jury—consistent with their previously disclosed opinions—the context of NU’s
24 conduct that the Court has already found to be in bad faith, and to testify to other
25 examples of NU’s bad faith relevant to compensatory and punitive damages.

26 ///

27 ///

28

B. NU Waited Nearly A Year After Learning Of Mr. Felton's Withdrawal And Incapacitation To Disclose It, Knowingly Failing To Raise The Issue On At Least Six Occasions

In early 2014, while the cross-motions for summary judgment were still pending, Mr. Felton suffered a stress-induced heart attack. (Decl. of Dean P. Felton in Supp. of Def.'s Mot. ("Felton Decl.") ¶2; Def.'s Mot. at 4.) Upon medical advice, Mr. Felton retired and withdrew as an expert in all his cases, including this one. (Felton Decl. ¶3.) Mr. Felton told NU of his incapacity on or about **May 16, 2014**, returning all materials to NU's counsel the following month. (Def.'s Mot. at 4; Felton Decl. ¶3 (emphasis added).) This was the *first* time NU failed to advise Plaintiffs or the Court of this significant development.

On September 30, 2014, as discussed above, the Court granted Plaintiffs' motion for partial summary judgment, leaving the testimony of the parties' bad faith claims handling experts relevant for trial to the extent it does not conflict with the Court's factual and legal determinations. Notwithstanding its knowledge of Mr. Felton's incapacity and withdrawal, NU failed to raise the issue with Plaintiffs and the Court for the *second* time.

On October 29, 2014, NU moved for reconsideration of summary judgment, rehashing its argument that bad faith was a factual question for the jury and inappropriate for summary judgment. (Dkt. No. 430.) Importantly, whether the reconsideration motion was granted or denied, bad faith claims handling experts would still be relevant for trial. Yet, NU failed to raise the issue of Mr. Felton's withdrawal with Plaintiffs and the Court for the *third* time.

A month later, when the parties were unable to reach a resolution at the December 2, 2014 Mandatory Settlement Conference, the Court turned to scheduling the remaining pretrial proceedings. (Goldfarb Decl. ¶6.) Presumably with the understanding that the parties had completed all fact and expert discovery back in February 2012, the Court set a Final Pretrial Conference on August 21,

1 2015, at which a trial date would be set. (*Id.*; Dkt. No. 435.) For the *fourth* time,
 2 NU remained conspicuously silent, failing to inform Plaintiffs or the Court about
 3 Mr. Felton's withdrawal six months earlier, and the potential impact of NU's
 4 designation of a substitute expert on the pretrial schedule. (Goldfarb Decl. ¶6.)

5 A few months later, at the February 6, 2015 hearing on NU's motion for
 6 reconsideration of summary judgment, NU passed up a *fifth* opportunity to tell the
 7 Court and Plaintiffs of Mr. Felton's withdrawal. (*Id.* ¶7.) And after the Court
 8 denied reconsideration on February 19, 2015 (Dkt. No. 439), NU ignored a *sixth*
 9 chance to raise the issue, choosing to stay mute for another six weeks.

10 **C. NU's Eventual Meet-And-Confer Disclosures About Mr. Felton's**
 11 **Incapacitation Ranged From Unreliable To Misleading**

12 On March 19, 2015, *Plaintiffs* suggested that the parties meet and confer to
 13 address upcoming pre-trial issues, including the April 17, 2015 deadline for pretrial
 14 motions. (Goldfarb Decl. ¶8.) During the initial meet-and-confer call on March 31,
 15 2015, NU first asserted that bad faith claims handling experts were unnecessary at
 16 trial based on the summary judgment ruling. (*Id.* ¶9.) When Plaintiffs disagreed,
 17 NU finally—and for the first time—raised the issue of expert substitution. (*Id.*
 18 ¶10.) Advising Plaintiffs that *Mr. Felton had died*, NU asked Plaintiffs to stipulate
 19 to NU's designation of an unidentified substitute expert if the Court were to permit
 20 bad faith claims handling experts at trial. (*Id.*)

21 Plaintiffs researched the timing of Mr. Felton's death to evaluate NU's
 22 diligence in raising the issue. (*Id.* ¶11.) Unable to find any information, Plaintiffs
 23 asked NU in an April 7, 2015 email to provide evidence confirming Mr. Felton's
 24 death. (Goldfarb Decl. ¶12, Ex. 6.) NU responded that it had been mistaken, and
 25 that Mr. Felton had not died, but instead had become medically unavailable due to
 26 a heart attack. (*Id.*) Given the circumstances, Plaintiffs fairly assumed Mr. Felton's
 27 incapacity was a recent event. (*Id.* ¶13.) Based on that assumption and trying to be
 28 reasonable, Plaintiffs asked NU on an April 13, 2015 meet-and-confer call whether

1 it would agree to limit its proposed substitute expert to Mr. Felton's remaining
 2 opinions and testimony. (*Id.*) When NU refused, stating that it would only agree to
 3 limit the new expert to the subjects of Mr. Felton's initial designation and that the
 4 new expert would "give whatever opinions he has," Plaintiffs had no choice but to
 5 decline the proposed stipulation as overbroad and prejudicial. (*Id.* ¶14.)

6 **D. NU Disclosed The True Facts Underlying Mr. Felton's**
 7 **Incapacitation For The First Time In Its Draft Motion**

8 On April 17, 2015, NU provided Plaintiffs a draft of its Motion for Leave to
 9 Substitute Expert Witness For An Unavailable Expert Witness, with an
 10 accompanying declaration from Mr. Felton. (Goldfarb Decl. ¶15, Exs. 7 & 8.) To
 11 their surprise, Plaintiffs learned for the first time that Mr. Felton had informed NU
 12 of his incapacitation and withdrawal on **May 16, 2014**—*eleven months earlier*. (*Id.*
 13 ¶15.) Understandably troubled, Plaintiffs sent NU a detailed letter on April 21,
 14 2015, suggesting that NU's omission regarding the timing of its disclosure in the
 15 meet-and-confer process from its motion may give the Court a false impression of
 16 the situation and the reason for Plaintiffs' unwillingness to stipulate to a substitute
 17 expert. (*Id.* ¶16, Ex. 9.) Plaintiffs also noted that, in the draft motion, NU
 18 seemingly abandoned its initial meet-and-confer position that bad faith claims
 19 handling experts were not necessary at trial. (*Id.*) Laying out the prejudice they
 20 would suffer from expert substitution at this late stage, Plaintiffs requested NU to
 21 further meet and confer, in good faith this time, about the scope of its proposed
 22 substitute expert's opinions, and to immediately produce the substitute expert
 23 report and other information for Plaintiffs to formulate a reasoned response. (*Id.*)

24 In its response on April 23, 2015, NU declined to engage in further meet and
 25 confer, saying only that it disagreed with Plaintiffs' "characterization" of the meet-
 26 and-confer process, that Plaintiffs would not be prejudiced because a trial date had
 27 yet to be set in the case, and that there was no expert report to produce because NU
 28 had yet to identify and retain a substitute expert. (*Id.* ¶17; Ex. 10.) Plaintiffs

1 attempted another meet and confer on April 30, 2015, confirming that they
 2 correctly understood NU's intended scope for the new expert's opinions. (*Id.* ¶18.)
 3 Without addressing the scheduling prejudice that would also need to be resolved,
 4 Plaintiffs again suggested that NU consider a stipulation that a substitute would not
 5 seek to offer additional opinions beyond those Mr. Felton would have been able to
 6 offer at trial had he not become incapacitated. (*Id.*) NU's counsel promised a
 7 response on May 1, 2015, but then asked for an extension until May 4, 2015 to
 8 provide a proposal and for Plaintiffs to serve their opposition to the motion. (*Id.*
 9 ¶19, Ex. 11.) In response, Plaintiffs' counsel sent a May 1, 2015 email detailing
 10 potential terms to resolve the dispute without Court intervention. (*Id.* ¶20, Ex. 12.)
 11 On May 4, 2015, NU's counsel stated that NU was still unable to respond, and
 12 asked for an extension until May 7, 2015 to provide a proposal and for Plaintiffs to
 13 serve their opposition to the motion. (*Id.* ¶21, Ex. 13.)

14 On May 5, 2015, NU rejected Plaintiffs' suggested stipulation and proposed
 15 an alternative. (*Id.* ¶22, Ex. 14.) Plaintiffs rejected NU's proposal because it would
 16 have forced Plaintiffs to essentially redo expert disclosures and discovery based on
 17 a substitute expert report that would not be limited to Mr. Felton's previously
 18 disclosed opinions or constrained by the Court's prior orders, and then require
 19 Plaintiffs to pursue burdensome motion practice before trial to enforce the Court's
 20 prior orders. (*Id.* ¶23; Ex. 15.) As a result, on May 6, 2015, Plaintiffs submitted to
 21 NU an opposition to its motion, and expected NU to promptly file, as a joint
 22 motion, NU's original motion and Plaintiffs' opposition. (*Id.* ¶24; Ex. 15.) On May
 23 18, 2015, NU instead transmitted a joint motion substantially revising its motion
 24 and requiring Plaintiffs to revise this opposition, which Plaintiffs delivered to NU
 25 on May 22, 2015. (*Id.* ¶25; Ex. 16.)

26 **III. LAW AND ARGUMENT**

27 Although there is little published law on this issue in the Ninth Circuit,
 28 courts in this Circuit generally evaluate motions to substitute an expert as requests

1 under Federal Rule of Civil Procedure 16(b) to amend a scheduling order for good
 2 cause. *See Park v. Cas Enters., Inc.*, No. 08-cv-385 DMS (NLS), 2009 U.S. Dist.
 3 LEXIS 108160, at *6-7 (S.D. Cal. Nov. 19, 2009). In order of importance, the two
 4 critical considerations are the (1) moving party's diligence and (2) prejudice to the
 5 opposing party. Though some courts do analyze expert substitution motions under
 6 Federal Rule of Civil Procedure 37, which authorizes the exclusion of an expert
 7 due to untimely disclosure, their analysis encompasses the Rule 16 factors. *See*
 8 *Nijjar v. Gen. Star Indem. Co.*, No.CV 12-08148 DDP (JCGx), 2014 U.S. Dist.
 9 LEXIS 8722, at *5 (C.D. Cal. Jan. 23, 2014) (analyzing whether delay in seeking
 10 expert substitution is substantially justified and harmless to the other party).
 11 Here, NU has not shown good cause, and the Court should deny its motion.

12 **A. NU's Motion Should Be Denied Solely Because It Does Not Seek A**
 13 **True Substitute For Mr. Felton, But A Better One**

14 Admittedly, the Court's *Daubert*, summary judgment, and other orders are
 15 interlocutory. However, by denying reconsideration of summary judgment, and
 16 considering only evidence that it did not exclude in its discovery rulings or
 17 otherwise deem inadmissible, the Court has signaled that its factual findings and
 18 legal conclusions on summary judgment are to be considered determined for
 19 purposes of trial. As this Court has itself held, subject to limited exceptions not at
 20 issue here, the law of the case doctrine ordinarily precludes a court "from
 21 reexamining an issue previously decided by the same court, or a higher court, in
 22 the same case." *Wagnier v. Nat'l City Mortg., Inc.*, No. 09cv2721-GPC-BGS,
 23 2013 U.S. Dist. LEXIS 102376, at *4-6 (S.D. Cal. July 22, 2013) (internal
 24 quotation marks and citation omitted). Given this, and particularly after the
 25 enormous time and expense devoted in this seven-year litigation to expert
 26 disclosures, expert discovery, as well as *Daubert* and summary judgment motion
 27 practice, it would be an unprecedented disregard of the law of the case to let NU
 28 use Mr. Felton's unfortunate incapacity to its advantage by securing an expert who

1 could opine beyond what Mr. Felton himself would have been allowed.

2 In this regard, NU makes two baffling and mutually contradictory assertions.
 3 On the one hand, it asserts that Mr. Felton’s “[*trial*] testimony would not have been
 4 limited to exactly what he wrote in his reports or exactly what he stated in his
 5 deposition.” (Mot. at 8 (emphasis in original).) On the other hand, it offers what
 6 appears to be a meaningless limitation—that “*the substitute expert should be*
 7 *permitted to testify [to] the same extent that Dean Felton would have been*
 8 *permitted to testify.*” (*Id.* (emphasis in original).) But the reason that testifying
 9 experts like Mr. Felton must provide detailed reports and be available for
 10 deposition is so that they fully disclose their anticipated trial testimony to the
 11 opposing party, and prevent unfair surprise at trial. *See* Fed. R. Civ. P. 26(a)(2)(B);
 12 *Jenkins v. Bartlett*, 487 F.3d 482, 487 (7th Cir. 2007) (expert report must provide
 13 “the substance of the direct examination” at trial). A necessary corollary to this
 14 requirement is that experts like Mr. Felton cannot testify *beyond* the specific
 15 opinions disclosed in their reports and discussed at their depositions. *See Yeti by*
 16 *Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (expert
 17 discovery rules have “teeth” because parties are forbidden from using at trial
 18 information expert did not disclose). Because Mr. Felton would necessarily be
 19 limited to testifying only as to his disclosed opinions—to the extent they survived,
 20 among others, the Court’s *Daubert*, summary judgment, and reconsideration
 21 rulings—NU’s argument that its proposed substitute need not be circumscribed to
 22 “the four corners of Dean Felton’s reports” appears to be an *undisguised* attempt to
 23 gain an unfair advantage.

24 But courts recognize that substitution of an expert is not supposed to
 25 advantage the moving party by allowing it to secure a better expert:

26 The purpose of allowing substitution of an expert is to put the movant
 27 in the *same* position it would have been in but for the need to change
 experts; it is not an opportunity to designate a *better* expert.

28 *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp.*, No. 2:13-

1 cv-01907-APG-NJK, 2015 U.S. Dist. LEXIS 45379, at *5-6 (D. Nev. Apr. 6,
 2 2015) (emphases added); *see also Adams v. Cooper Indus., Inc.*, No. 03-476, 2007
 3 U.S. Dist. LEXIS 99057, at *8 (E.D. Ky. Apr. 5, 2007) (substitution is not intended
 4 to allow the designation of a “superior” expert). By refusing to limit its substitute
 5 expert’s report and opinions to Mr. Felton’s surviving opinions, NU seeks exactly
 6 what courts find impermissible—a “better” and “superior” expert.

7 To set the broadest possible foundation for this better substitute expert, NU
 8 states that Mr. Felton evaluated “coverage issues” and “opined on the
 9 reasonableness of” NU’s handling and investigation of Plaintiffs’ claim. (Mot. at
 10 3.) But, as discussed above, the Court excluded or rejected virtually all of Mr.
 11 Felton’s coverage and claims handling opinions. (*See App.* at i-xii.) This is an
 12 example of why NU’s proposal to limit its substitute expert to the “same scope and
 13 substance of Mr. Felton’s opinions” is meaningless because it would allow NU to
 14 revive bad faith claims handling opinions to which Mr. Felton could not have
 15 testified but for his medical incapacitation. Indeed, had he not become medically
 16 incapacitated, Mr. Felton would have had little, if any, relevant and admissible
 17 expert testimony to offer the jury, and NU would have no way to fix or augment
 18 Mr. Felton’s opinions. As the United States Supreme Court has recognized, albeit
 19 in a different context, “[i]t is implausible to suggest, post-*Daubert*, that parties will
 20 initially present less than their best expert evidence in the expectation of a second
 21 chance should their first try fail.” *Weisgram v. Marley, Co.*, 528 U.S. 440, 455
 22 (2000) (affirming appellate court’s entry of judgment for defendant after reversing
 23 denial of motion to exclude plaintiff’s experts, and rejecting argument that a
 24 remand should have been ordered so plaintiff could present new experts). NU’s
 25 “first try” at a bad faith claims handling expert—Mr. Felton—could not have
 26 offered much in the way of relevant and admissible testimony at trial. Thus, his
 27 incapacitation should not entitle NU to a second chance to designate a new and
 28 “better” substitute expert.

1 Though NU cites a few cases where courts permitted expert substitution and
 2 only limited the substitute expert report to the same subject matter as—but not the
 3 exact opinions of—the prior expert, these cases undermine, rather than support
 4 NU’s position. For example, in *Lincoln National Life Insurance Co. v.*
 5 *Transamerica Financial Life Insurance Co.*, defendant’s prior damages expert in
 6 consolidated patent infringement cases became unavailable after being convicted
 7 of unrelated embezzlement. Nos. 1:04-CV-396, 1:06-CV-317, 2010 U.S. Dist.
 8 LEXIS 103744, at *1 (N.D. Ind. Sept. 30, 2010). Finding “persuasive” plaintiff’s
 9 argument that the substitute’s testimony must be limited, the court instructed that
 10 the substitute damages expert could “review all of the evidence, conduct his own
 11 independent analysis, and express his opinion in his own words,” *as long as* he had
 12 a similar area of expertise, employed the same methodology as the prior expert,
 13 and did not make “meaningful changes” to the prior expert report. *Id.* at *11.
 14 Unlike the substitution request before this Court, in *Lincoln National* there had
 15 been no *Daubert* ruling limiting the prior expert’s testimony, nor a ruling on the
 16 parties’ pending cross-motions for summary judgment, but the court still noted that
 17 an expert’s unavailability does not provide a party “with *carte blanche* to generate
 18 an entirely new damages theory after approximately five years of litigation and less
 19 than six months from trial.” *Id.* at *1, 3, 11; *cf. also, e.g., Ind. Ins. Co. v. Valmont*
 20 *Elec., Inc.*, No. TH 97-009-C-T/F, 2001 U.S. Dist. LEXIS 23256, at *4 (S.D. Ind.
 21 Dec. 27, 2001) (“[A]llowing this supplement is **NOT** an invitation . . . to introduce
 22 new and different theories in this case.” (emphasis in original)). *Lincoln National*,
 23 therefore, does not help NU.

24 Courts in the remaining cases that NU cites implicitly recognize that a true
 25 substitute is limited to the prior expert’s opinions by holding that the original
 26 expert’s report and testimony can be used to impeach the substitute expert. *See,*
 27 *e.g., Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 22 (D.P.R. 2009)
 28 (permitting impeachment of the substitute expert through the prior expert’s report

1 so that the moving party would not be able to “escape” from the prior expert’s
 2 “concessions or admissions”); *accord Abbott v. Lockheed Martin Corp.*, No. 06-
 3 cv-0701, 2014 U.S. Dist. LEXIS 163521, at *2-4 (S.D. Ill. Nov. 21, 2014). Here,
 4 safeguards such as limiting the substitute expert report to the same methodology
 5 and subject matter as Mr. Felton; allowing Plaintiffs to use Mr. Felton’s reports
 6 and deposition transcript for impeachment; or inviting Plaintiffs to use motions in
 7 limine to restrict the substitute expert’s trial testimony to Mr. Felton’s surviving
 8 opinions, are not sufficient given how little Mr. Felton could have offered in the
 9 way of admissible testimony. NU casually argues that Plaintiffs will not be
 10 prejudiced by the proposed substitution because “any attempt by NU to add to Mr.
 11 Felton’s opinions would . . . arguably be subject to motion in limine.” (Mot. at 13-
 12 14.) But the unfairness and prejudice lies in forcing Plaintiffs to shoulder the
 13 burden of full discovery depositions on new opinions and previously rejected
 14 opinions, and of then enforcing the law of the case at trial as to Mr. Felton’s
 15 surviving opinions.

16 For this reason alone, NU’s motion should be denied.

17 **B. NU Fails To Show Good Cause For Even A True Substitute Given**
 18 **Its Lack Of Diligence And Candor**

19 Even if NU were seeking a true substitute, it has not established good cause
 20 to do so. NU failed to disclose Mr. Felton’s incapacitation and withdrawal to
 21 Plaintiffs and the Court for almost a year, including for six months after the
 22 Court’s summary judgment order. It remained studiously silent about the issue in
 23 moving for reconsideration; at a settlement conference when it would have been
 24 natural and appropriate to address the impact of this issue on pretrial deadlines; at
 25 the hearing on its reconsideration motion; and weeks after the denial of
 26 reconsideration. When it finally broached the issue—at a meet-and-confer *initiated*
 27 *by Plaintiffs* to discuss pretrial issues—NU began by providing inaccurate and
 28 incomplete information, possibly to hide its intentional failure to disclose Mr.

1 Felton’s incapacity for nearly a year. Indeed, it was only when Plaintiffs disagreed
2 with NU’s position that Plaintiffs’ bad faith claims handling experts were not
3 necessary at trial that NU said that Mr. Felton was dead, and pressed Plaintiffs to
4 stipulate to a substitute expert. Then, it was only when Plaintiffs could find no
5 proof of Mr. Felton’s death that NU retracted its statement, saying that Mr. Felton
6 was actually medically incapacitated, and again pressed for a stipulation *without*
7 *agreeing to limit the substitute’s opinions and report to Mr. Felton’s remaining*
8 *opinions*. Even so, instead of telling Plaintiffs that Mr. Felton’s incapacitation and
9 withdrawal occurred nearly a year earlier, NU gave Plaintiffs the false impression
10 that these were recent developments about which it was understandably confused.

11 And finally, in its draft motion—which it revised substantially after
12 reviewing Plaintiffs’ opposition before inclusion into this “joint motion”—NU
13 omitted this history, and implied instead that Plaintiffs were callous and
14 unreasonable in refusing to stipulate to a substitute expert despite being aware of
15 the unfortunate facts surrounding Mr. Felton’s incapacitation. NU now argues that
16 it appropriately waited to seek a substitute expert until it became clear after various
17 court rulings that claims handling bad faith experts would still be relevant at trial.
18 But NU makes no effort to refute that these experts’ relevance was certain on
19 September 30, 2014 (when the court issued its Summary Judgment Order), or that
20 NU’s motion for reconsideration would not have altered that relevance whether it
21 was granted or denied. Nor does NU explain why it did not immediately advise
22 Plaintiffs and the Court of Mr. Felton’s incapacity as soon as the Court denied
23 NU’s motion for reconsideration on February 19, 2015, which even NU contends
24 is the watershed event. At that time, NU admits it knew that all motions (except
25 motions in limine) were due on April 17, 2015. But instead of immediately
26 coming forward—and seeking out a substitute expert—NU first made misleading
27 and incomplete disclosures about the true circumstances, dragged out this motion
28 process, and made no effort to even identify a potential substitute expert until May

1 2015, *after* Plaintiffs objected to the NU's continual delay. Under these
2 circumstances, NU's conduct has every indicia of bad faith and gamesmanship, an
3 unfortunate continuation of the "unnecessarily aggressive" litigation tactics that the
4 Court found to be bad faith in its summary judgment order. (Dkt. No. 427 at 83).

5 Therefore, as courts routinely do when a party delays raising an expert's
6 incapacitation for much less than the time involved here, this Court should find
7 that NU failed to act diligently, and deny its motion for even a true substitute. For
8 example, in *Nijjar v. General Star Indemnity Co.*, the district court denied
9 substitution of plaintiff's claims handling expert after plaintiff waited more than a
10 month after discovering that the expert had a conflict of interest, and more than
11 five weeks after defendant rejected its proposed stipulation, because even this short
12 delay constituted failure to "exercise reasonable diligence . . . after the conflict was
13 brought to his attention." 2014 U.S. Dist. LEXIS 8722, at *7-8. Notably, and
14 contrary to NU's assertion, there does not appear to have been a trial date set in
15 *Nijjar*, as here, so the court focused exclusively on plaintiff's lack of diligence and
16 how that would inevitably delay *trial* proceedings. NU compares its conduct
17 favorably with that of the plaintiff in *Nijjar* (Mot. at 10), but the attempt falls flat
18 because NU's conduct is worse. NU did not merely "neglect" something or make a
19 "careless" mistake, it *carefully* and *deliberately* failed to raise the issue for nearly a
20 year when the parties could have avoided wasting time and interrupting trial
21 preparation.

22 Under certain circumstances, as in a few cases NU cites, this Court could
23 give credence to a party's explanation that it honestly (if mistakenly) believed that
24 it could wait a short while to disclose and raise its expert's incapacitation while the
25 court ruled on dispositive motions. *See, e.g., Park*, 2009 U.S. Dist. LEXIS 108160,
26 at *8-9 (granting substitution because, while plaintiff could have acted sooner, it
27 did not show bad faith by failing to move for substitute damages expert for two
28 months); *Baumann v. Am. Family Mut. Ins. Co.*, 278 F.R.D. 614 (D. Colo. 2012)

1 (granting expert substitution three weeks before trial because plaintiff's expert died
2 recently and he quickly moved to substitute). Here, however, Mr. Felton was not
3 incapacitated recently and NU did not move to substitute quickly or wait only a
4 few short months. Rather, it waited nearly a year, until pretrial motions were due,
5 claiming that it first needed the Court to rule on the parties' cross-motions for
6 summary judgment, and then on its reconsideration motion—the outcome on the
7 latter of which would not impact the need for a bad faith claims handling expert.
8 But, as another court found under analogous circumstances, awaiting a court's
9 ruling on a motion before raising the issue of expert substitution constitutes
10 imprudence, not diligence. *See LNC Invs. v. First Fid. Bank*, No. 92 Civ. 7584
11 (CSH), 2000 U.S. Dist. LEXIS 13038, at *5-9 (S.D.N.Y. Sept. 11, 2000) (denying
12 substitution because defense counsel's failure to stay in touch with its expert and
13 learn about his death, believing that expert testimony would be unnecessary due to
14 a pending motion to exclude plaintiffs' experts, was "imprudent"). It is true that,
15 unlike defendants in *LNC*, at least NU was not "inexcusably ignorant" of its
16 expert's availability in the face of an impending trial date. (Mot. at 11.) Even
17 worse, though, NU was *inexcusably* silent for eleven months about its expert's
18 incapacitation in the face of at least half a dozen opportunities to disclose the issue,
19 and maintain the level playing field that it now conveniently invokes to support its
20 request for a substitute expert.

21 Admittedly, no trial date is set in the case yet, and the Court won't set one
22 until the final pretrial conference currently scheduled on August 21, 2015. (Dkt.
23 No. 435.) Thus, a circumstance that many courts deem important in denying an
24 expert substitution motion—an impending trial date—is not an issue here. *See,*
25 *e.g., Jones v. Devaney*, 107 F. App'x 709, 711 (9th Cir. 2004) (affirming denial of
26 motion to substitute medical expert, filed on the eve of trial, because plaintiff
27 provided "no good cause for the seven-month delay"). But, NU should not be
28 heard to rely on the lack of a trial date to explain or excuse its intentional lack of

1 diligence. Moreover, there are many other circumstances present here to make up
 2 for the fact that the parties are not on the *literal* eve of trial, such as the seven-year
 3 pendency of this litigation; the procedural posture of this case after the Court's
 4 *Daubert*, summary judgment, and reconsideration rulings; the operative pre-trial
 5 schedule; and NU's inexplicably long delay, lack of candor, and eventual
 6 unreliable disclosures during meet and confer. *C.f., e.g., Pfizer, Inc. v. IVAX*
 7 *Pharms., Inc.*, No. 07-174 (DMC), 2009 U.S. Dist. LEXIS 54910, at *8 (D.N.J.
 8 June 29, 2009) (timing of defendant's disclosure was "fatal," and there was "[n]o
 9 reasonable justification for defendants' delay" of two years after learning of
 10 expert's death to raise the issue).

11 **C. Given The Developments In And The Posture Of This Case,**
 12 **Granting Any Substitution Risks Severe Prejudice To Plaintiffs**
 13 **Even Though The Court Has Not Yet Set A Trial Date**

14 After the moving party's diligence, prejudice to the opposing party is the
 15 next important consideration in addressing a motion to substitute an expert. *Park*,
 16 2009 U.S. Dist. LEXIS 108160, at *6. This factor also weighs in favor of denying
 17 NU's motion, even if NU had sought a true substitute, because Plaintiffs will be
 18 severely prejudiced by the substitution regardless of whether the Court maintains
 19 the current pre-trial schedule, or delays it and the scheduling of a trial date.

20 Under the first scenario, Plaintiffs will suffer severe prejudice even though
 21 no trial date is set. Significant evidence regarding NU's multidimensional bad
 22 faith, including its motives and intent, remains highly relevant at trial. Given the
 23 importance of this case, Plaintiffs' counsel made arrangements to juggle their
 24 schedules and their remaining cases to put in the work necessary to prepare for trial
 25 based on the Court's December 8, 2014 pre-trial order and upcoming Final Pretrial
 26 Conference on August 21, 2015. But now—after NU retains the substitute expert
 27 and, if permitted, provides his report by June 30, 2015—Plaintiffs' counsel will be
 28 forced to pivot to the significant task of evaluating a potentially lengthy and

1 complex expert report, preparing rebuttal reports, deposing the substitute expert,
2 defending further depositions of Plaintiffs' experts, and likely bringing another
3 *Daubert* motion instead of focusing on the important required pretrial filings and
4 the usual, time-intensive trial preparation. Without knowing what limits the Court
5 will impose, and without evaluating the proposed substitute expert's report, it is
6 hard to determine whether rebuttal reports and a *Daubert* motion will be necessary,
7 predict how long it will take to prepare for and conduct the substitute expert's
8 deposition, and generally evaluate the impact of the proposed substitution. But, if
9 past practice is any indication, these tasks will consume Plaintiffs' lead lawyers for
10 hundreds of hours that will indisputably and irreparably interfere with trial
11 preparation. NU fails even to acknowledge that its strategic delay will prevent
12 Plaintiffs from effectively preparing for trial at the most critical stage, pretending
13 that there will be no prejudice. NU's gamesmanship should be viewed in the
14 context of the Court's finding on summary judgment that NU has repeatedly
15 engaged in unnecessarily aggressive and bad faith litigation conduct.

16 Alternatively, under the second scenario, having finally obtained summary
17 judgment on NU's liability for breach of contract and bad faith more than seven
18 years after the fact, NU's lack of diligence will cause Plaintiffs further delay in
19 finally vindicating their rights at trial. This type of prejudice to the opposing
20 party—either with respect to its trial preparation or as a result of trial
21 continuation—is exactly what other courts rely on to deny expert substitution, even
22 if, unlike NU, the moving party is diligent. *See, e.g., Scheel v. Harris*, No. 3:11-17-
23 DCR, 2012 U.S. Dist. LEXIS 126448, at *36-37 (E.D. Ky. Sept. 6, 2012) (while
24 delay in supplementing expert disclosures was an "honest mistake," allowing
25 substitution would be "unfair" because discovery would be re-opened, a new round
26 of *Daubert* motions allowed, and the trial date continued); *Pfizer, Inc.*, 2009 U.S.
27 Dist. LEXIS 54910, at *12-14 (denying expert substitution three months before
28 final pretrial conference and five months before trial as it would interfere with

1 plaintiff's "trial preparation and presentation of its case," and require it to "engage
2 in discovery[,] . . . secure rebuttal reports and incorporate its findings into its
3 pretrial submissions"); *LNC Invs.*, 2000 U.S. Dist. LEXIS 13038, at *8-10
4 (denying substitution because it would either disturb plaintiff's trial preparation or
5 require continuance).

6 The procedural posture of the case only increases the prejudice to Plaintiffs.
7 During the initial round of expert discovery, both parties' experts produced their
8 reports simultaneously, without seeing their counterpart's report, although each
9 had an opportunity to issue a rebuttal report. Here, by contrast, NU's substitute
10 expert would have the benefit of seeing Plaintiffs' experts' initial and rebuttal
11 reports, as well as the Court's *Daubert*, summary judgment, reconsideration, and
12 other rulings to the extent he wanted to try and work around them. But as another
13 court recognized, allowing "the new expert to craft a report with the benefit of
14 seeing the contentions of the opposing expert in advance" is a factor in evaluating
15 prejudice from the substitution. *Nijjar*, 2014 U.S. Dist. LEXIS 8722, at *8-9
16 (denying substitution of claims handling expert because of prejudice to defendant,
17 including from reopening discovery and postponing trial proceedings).

18 Not surprisingly, the cases that NU cites to support allowing substitution
19 bear little resemblance to the circumstances here. For example, in *Ferrara &*
20 *DiMercurio v. St. Paul Mercury Insurance Co.*, the First Circuit affirmed the
21 decision to allow plaintiff to replace its cause-and-origin expert in a case involving
22 insurance coverage of a fire because the original expert died, the substitute was
23 already an expert on the related issue of the electrical systems underlying the fire,
24 and there would be no "meaningful change" in the substitute expert's testimony.
25 240 F.3d 1, 10-11 (1st Cir. 2001). Unlike the plaintiff in *Ferrarra & DiMercurio*,
26 NU has not chosen an existing expert; rather, it only identified (but has not yet
27 retained) one after reviewing Plaintiffs' opposition to its draft substitution motion.
28 Similarly, NU's reliance on *Guerra v. Paramo* is misplaced because the court there

1 affirmed a decision to allow defendants to designate a forgery expert after the
 2 discovery cutoff because it only recently became clear that plaintiff may have
 3 forged evidence. 251 F. App'x 424 (9th Cir. 2007). Here, there are no such recent
 4 or belated developments to explain NU's lack of diligence.

5 In short, NU fails to establish good cause even for a true substitute, both due
 6 to its lack of diligence and the prejudice Plaintiffs would suffer.

7 **D. If The Court Is Inclined To Grant NU's Motion, It Should Impose**
 8 **Strict Conditions To Mitigate The Prejudice To Plaintiffs**

9 If the Court is nonetheless inclined to provide NU some relief, it should
 10 minimize the prejudice to Plaintiffs by imposing the following conditions:
 11 (1) limiting the substitute expert's report and trial testimony to providing only the
 12 specific opinions disclosed by Mr. Felton, as appropriately narrowed by the impact
 13 of, among others, the Court's *Daubert*, summary judgment, and reconsideration
 14 rulings; and (2) delaying all pretrial deadlines and the final pretrial hearing by three
 15 months from the date the substitute expert report is produced.

16 First, there is ample authority to limit NU's substitute expert to Mr. Felton's
 17 surviving opinions. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*,
 18 MDL No. 1869, 2014 U.S. Dist. LEXIS 165769, at *27-28 (D.D.C. Nov. 26, 2014)
 19 (prohibiting substitute expert from giving "any new theory of liability, impact, or
 20 damage" and confining "his or her opinions to the reliability, integrity, and
 21 accuracy of" prior expert's work); *Doctor's Assocs., Inc. v. QIP Holder LLC*, No.
 22 06-cv-1710(VLB), 2009 WL 5184404, at *1-2 (D. Conn. Dec. 23, 2009) (limiting
 23 new damages expert's testimony to "establishing the veracity and integrity of the
 24 original expert and the conclusions reached in the original expert's report"). NU's
 25 arguments to distinguish these authorities ring hollow. NU itself cites *Doctor's*
 26 *Associates* to support its request for substitution (Mot. at 8 n. 2), yet claims that
 27 Plaintiffs' reliance on it is misplaced because the case is "vastly different." (*Id.* at
 28 9-10.) Moreover, though plaintiffs in *In re Rail Freight* did seek a supplemental

1 expert, and not a substitute, NU fails to mention that the court analyzed the request
 2 under the “good cause” standard for expert substitution: “Although plaintiffs have
 3 moved to add a supplemental expert—as opposed to a straight substitution of one
 4 expert for another—the analysis *remains the same*: does good cause exist to alter
 5 the scheduling order and reopen discovery for this purpose?” *In re Rail*, 2014 U.S.
 6 Dist. LEXIS 165769, at *21 (emphasis added; footnote omitted).

7 Second, the Court retains discretion to continue pretrial deadlines to
 8 accommodate Plaintiffs’ and their experts’ review of NU’s substitute expert report
 9 and potential rebuttal reports; the deposition of the substitute expert; and the
 10 preparation and hearing on a potential *Daubert* motion regarding the substitute
 11 expert. *See United States ex rel. Suter v. Nat’l Rehab Partners, Inc.*, No. CV-03-
 12 15-S-BLW, 2006 U.S. Dist. LEXIS 88599, at *2, 7 (D. Idaho Dec. 6, 2006)
 13 (granting expert substitution subject to extending pretrial deadlines). Without
 14 having the substitute expert’s report, three months is Plaintiffs’ best estimate of the
 15 additional time by which pretrial deadlines should be extended.

16 **IV. CONCLUSION**

17 Plaintiffs understand and appreciate that NU did not cause Mr. Felton’s
 18 medical incapacitation or withdrawal. And, all things being equal, Plaintiffs are not
 19 seeking to have NU placed in a worse position than it would have been but for Mr.
 20 Felton’s unfortunate incapacitation. However, a substitute expert who may issue a
 21 report and opine beyond what little Mr. Felton could have offered at trial would not
 22 put NU in the same position it would have been, but in a better position. And that
 23 is neither the purpose of allowing expert substitution, nor consistent with the law
 24 of the case doctrine. Moreover, NU has not acted with diligence and candor, has
 25 rejected proper limitations on its substitute expert report, and is essentially seeking
 26 to have Plaintiffs shoulder all the prejudice of its strategic decision to repeatedly
 27 delay raising this issue for nearly a year. To avoid both validating NU’s lack of
 28 diligence and prejudicing Plaintiffs, the Court should deny NU’s motion.

1 ///

2 Alternatively, if the Court is inclined to grant NU some relief, Plaintiffs
3 respectfully request that the substitute expert's report and trial testimony be limited
4 only to the specific opinions disclosed by Mr. Felton, as narrowed by, among other
5 rulings, the Court's *Daubert*, summary judgment, and reconsideration rulings; and
6 that all pretrial deadlines and the final pretrial hearing be delayed by three months
7 from the time NU produces the substitute expert report.

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JOINT CONCLUSION

NU's Motion is being submitted in the format of a "Joint Motion", and each of the undersigned counsel agree that the positions of their respective client(s) are contained in the corresponding sections above.

DATED: May __, 2015

SEDGWICK LLP

By: _____

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**APPENDIX IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO
SUBSTITUTE AN EXPERT WITNESS FOR AN
UNAVAILABLE EXPERT WITNESS**

PLAINTIFFS' APPENDIX

Mr. Felton's 10 Initial Opinions	Relevant Court Ruling
<u>"Other Insurance" – Opinion Nos. 1 and 10</u>	
<p>Plaintiffs sought insurance for the escrow transaction losses at issue from both their Miscellaneous Professional Liability ("MPL") insurers and Financial Institution Bond ("FIB") insurers. (Ex. 3 to Goldfarb Dec., Felton Report at 47-50.) Pursuant to the "Other Insurance Or Indemnity" provision of the Financial Institution Bond ("FIB"), coverage under the FIB is only "excess over any valid and collectible Insurance or Indemnity obtained by" Plaintiffs. (<i>Id.</i> at 46.) Plaintiffs ultimately obtained certain recoveries from the MPL insurers. (<i>Id.</i> at 47-50.) These recoveries constitute other "valid and collectible Insurance" under the FIB's "Other Insurance Or Indemnity" provision, thereby reducing (and essentially zeroing) Plaintiffs' potential insurable losses under the FIB. (<i>Id.</i> at 47-51.)</p>	<p>Mr. Felton's opinions on the topic of "Other Insurance" are unreliable. "The Court grants the motion to exclude Felton's opinions about the application of the "Other Insurance or Indemnity" provision. (Dkt. No. 420, <i>Daubert</i> Ruling at 7-8 (citing Felton Report at 47-50 and Felton Rebuttal Report at 45-46).)</p>
<u>The viability of NU's Discovery and Termination defenses – Opinion Nos. 2-5</u>	
<p>Pursuant to the FIB's discovery provision, the FIB generally covers only those losses discovered during the bond period. (Felton Report at 29.) Discovery of a loss can occur when Plaintiffs receive notice of an actual or potential claim in which there is an allegation that</p>	<p>Mr. Felton is "not qualified to testify that the Medhi escrow transaction was or was not fraudulent." (<i>Daubert</i> Ruling at 7.) "NU has not shown that Felton has the necessary experience or training to give an opinion about escrow transactions, banking laws, or fraud."</p>

1 Plaintiffs are liable to a third party under
 2 circumstances which, if true, would
 3 constitute a loss under the FIB. (*Id.*)
 4 Further, if the claim involves an
 5 employee's dishonest or fraudulent act,
 6 the FIB terminates coverage as to all
 7 losses caused by that employee. (*Id.* at
 8 30.)

9 On November 15, 2004, one of
 10 Plaintiffs' escrow attorneys received a
 11 letter from a party to the "Mehdi"
 12 transaction. Based on the attorney's
 13 escrow experience and knowledge, the
 14 letter should have put Plaintiffs on
 15 notice of a claim for bank fraud and
 16 Zuzzette Nieto's, one of Plaintiffs'
 17 employees, participation in the fraud.
 18 This discovery terminated the FIB as to
 19 all losses caused by Ms. Nieto after
 20 November 15, 2004. Further, because
 21 the loss was discovered during the
 22 2003-2004 FIB period and before the at-
 23 issue FIB came into place, Plaintiffs
 24 cannot recover for any losses caused by
 25 Ms. Nieto before November 15, 2004.
 26 (*Id.* at 29-30, 51-53.)

(*Id.*)

Moreover, the Discovery Provision in
 the FIB was not triggered because it
 only applies if there is discovery of
 dishonesty of a loss of the type covered
 by the FIB. (Dkt. No. 427, SJ Order at
 49.) "The Court agrees that NU has
 failed to present evidence showing that
 either the Kaplan or Medhi transaction
 involved a type of loss covered by the
 FIB." (*Id.*)

Furthermore, while there may be issues
 of material fact concerning when, and
 even if, Plaintiffs discovered a dishonest
 or fraudulent act of Ms. Nieto, and if
 coverage was terminated for her as a
 result, these material facts are irrelevant.
 This is because Plaintiffs are entitled to
 judgment as a matter of law under the
 FIB's Forgery Insuring Agreement. (*Id.*
 at 47-48, 56-57.)

20 The quality and effect of Plaintiffs' Proofs of Loss - Opinion Nos. 6 and 8

22 Within six months after Plaintiffs' loss
 23 was discovered, the FIB required
 24 Plaintiffs to furnish to NU a proof of
 25 loss, duly sworn to, with full particulars.
 26 (Felton Report at 45.) Without this proof
 27 of loss, an insurer, like NU, cannot
 28 begin an investigation into the claims.
 (*Id.* at 45, 53-54.) Further, an insured,
 like Plaintiffs, cannot fulfill its proof of
 loss obligation simply by producing a

Mr. Felton's "formal proof of loss
 opinion", namely, "that an insurance
 company does not have a duty to
 investigate until the insured submits a
 'properly executed proof-of-loss' form
 is inadmissible because it "contradicts
 California law." (*Daubert* Ruling at 5.)
 Indeed, under California law, a proof of
 loss is simply "[a]ny evidence or
 documentation . . . that provides any

1 mound of evidence with an expectation
2 that the insurer will somehow find all
3 that is necessary to prove the insured's
claim. (*Id.* at 28.)

4 The Proofs of Loss that Plaintiffs
5 submitted to NU in 2008 and, then
6 amended in 2009, were insufficient and
7 did not rise to the standards of making
8 or substantiating a claim for a loss
9 covered by the FIB. (Felton Report at
10 53-54.) Because the Proofs of Loss were
11 insufficient, NU was not able to issue a
12 coverage decision and is entitled to
13 continue investigating the claims during
14 this litigation. (*Id.*) Another reason NU
was not able to issue a coverage
decision and is entitled to continue
investigating the claims is because
Plaintiffs' claims have undergone
significant changes.

evidence of the claim and that
reasonably supports the magnitude or
the amount of the claimed loss." (*Id.*)

NU did not need a sworn proof of loss
"to begin its investigation, which
includes reading the information the
insured provided and considering
potential bases for coverage under the
FIB." (SJ Order at 77.) Additionally,
Plaintiffs were not "required to submit a
particular type of form to trigger the
insurer's duty to investigate and
determine coverage." (*Id.*) The evidence
in the case "overwhelming" shows that
Plaintiffs fulfilled their proof of loss
obligation by providing NU the original
and revised proofs of loss, as well as all
of the at-issue escrows and pleadings
and discovery from the underlying
litigation. (*Id.* at 65-68, 78-79, 81-82.)

Moreover, NU has failed to explain why
it did not issue a coverage opinion
"within the 40-day rule established by
California regulations." It had long
known about Norton's fraud, had all of
the relevant depositions, and could have
analyzed the discovery, termination, and
forgery arguments at any time. (*Id.* at
79.) Thus, "[t]he record establishes that
NU unreasonably delayed processing
FNF's FIB claim and did not timely
determine coverage." (*Id.*)

NU argues that "it cannot be faulted" for
failing to investigate or determine
coverage when the amount of Plaintiffs'
loss has "undergone multiple and
dramatic changes." But, "[t]he actual
facts expose the fallacy of this
argument." All NU had to do "to begin

	<p>to determine the amount of loss was start with one victim and analyze the evidence according to the actual terms of the FIB policy.” Plaintiffs’ “voluntary reduction of the amount claimed during litigation does more harm to NU’s position than to persuade the Court it acted in good faith.” (<i>Id.</i> at 80-82.)</p>
<p><u>Whether direct loss could only apply to a claimant’s money paid into escrow - Opinion No. 7</u></p>	
<p>The FIB only provides indemnity for direct losses suffered as a result of a covered peril. (Felton Report at 31, 32, 53.) Funds lost by the investors based on their partnerships with Norton or through loans with Norton are not covered. Further, any funds that Plaintiffs paid to settle the investors claims which were paid for “indirect or consequential losses” or “punitive or multiple damages” are not covered. (<i>Id.</i>)</p>	<p>The FIB broadly defines “property” to include the interest held in escrow. (SJ Order at 17.) The funds in escrow represent the value of the real estate, and Plaintiffs were responsible for those assets when they were wrongfully diverted to a criminal enterprise by forging the signature of victims who had entrusted title and monies in escrow for safekeeping by Plaintiffs until the transactions closed. (<i>Id.</i>)</p> <p>The FIB provides coverage for “any portion of a settlement payment to a third party that is ‘attributable to a loss directly resulting from one of the insuring agreement.’” (<i>Id.</i> at 18.) The Forgery Insuring Agreement covered Plaintiffs for transferring, paying, or delivering “any funds or Property” based on forged documents. (<i>Id.</i>) Because Plaintiffs relied on forged documents in closing the escrows, Plaintiffs have “satisfied the direct loss element.” (<i>Id.</i>) Thus, Plaintiffs’ loss, including its “third-party settlement[s]”, are covered. (<i>Id.</i> at 18-19.) Plaintiffs’</p>

	losses include those suffered by both investors of Norton and non-investors as these losses resulted from Norton's actions in forging the investors' names to process escrows. (<i>Id.</i> at 19-27.)
<u>The "Catch-all" – Opinion No. 9</u>	
<p>There is no foundation for Plaintiffs' bad faith claim for a number of reasons, including: (1) because the proofs of loss Plaintiffs submitted were deficient and, as such, NU's investigation continues; (2) there are genuine disputes as to coverage issues, including termination and discovery; (3) there are genuine disputes as to the quantum of loss; and (4) as NU's investigation was reasonable from 2006 through 2008 and continues to be reasonable to this day. (Felton Report at 54-55.)</p>	<p>The evidence in the case "overwhelming" shows that Plaintiffs fulfilled their proof of loss obligation by providing NU the original and revised proofs of loss, as well as all of the at-issue escrows and pleadings and discovery from the underlying litigation. (SJ Order at 65-68, 78-79, 81-82.) NU cannot rely on the genuine dispute doctrine "because it did not adequately or promptly investigate [Plaintiffs'] claim for Forgery benefits." (<i>Id.</i> at 73; <i>see also</i> Dkt. 439, Reconsideration Order at 8-9 (rejecting argument the genuine dispute doctrine applied because "[t]he record showed NU had the necessary facts but never considered whether it was liable for the claim as forgery by a non-employee").) Additionally, NU's "coverage position was unreasonable because it was based on assumptions" (SJ Order at 74) and, in any event, "the Court rejected NU's interpretation of the contract terms that might have excused its performance." (<i>Id.</i> at 73.) Finally, as for its quantum of loss argument, "[t]he actual facts expose the fallacy of this argument." (<i>Id.</i> at 81.) Indeed, "[a]ll NU had to do to begin to determine the amount of loss was start with one victim and analyze the evidence according to the actual terms</p>

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of the FIB policy . . . Any one or two of the First Wave settlement payments could have exhausted NU's exposure under the \$15 million FIB policy." (*Id.*)

The totality of circumstances shows that NU unreasonably and in bad faith withheld payment from its insureds. By 2007 or 2008, Plaintiffs had given NU sufficient information to conduct an investigation and make a coverage determination. NU's after-the-fact explanations do not excuse its clear breach of its basic obligations towards its insureds. (*Id.* at 85; *see also* Reconsideration Order at 8.)

Mr. Felton's 13 Rebuttal Opinions	Relevant Court Ruling
<u>An MPL claim investigation is different from a FIB claim investigation – Opinion No. 2</u>	
<p>Plaintiffs suggest NU should have completed its investigation of Plaintiffs' claim earlier and issued a coverage decision as, with the same information, NU's MPL claims handler made a coverage determination in 2007. A claim investigation under a FIB, however, is different from a claim investigation under a MPL. (Ex. 4 to Goldfarb Dec., Felton Rebuttal Report at 13-14.) This is because unlike a FIB, MPLs have absolute dishonesty exclusions. (<i>Id.</i> at 14.) This makes insureds less likely to search for dishonesty in their MPL claims as it would preclude coverage. (<i>Id.</i>) Further, proofs of loss are required for a FIB employee dishonesty claim before an investigation commences due to defamation concerns. (<i>Id.</i> at 34.) This is unlike an MPL claim where there are no proof of loss requirements. Here, Plaintiffs continuously revised their claims through proofs of loss and other changes during the course of litigation making it more difficult to undertake and complete an investigation. (<i>Id.</i> at 15-16.)</p>	<p>"The record establishes that NU unreasonably delayed processing FNF's FIB claim and did not timely determine coverage. By contrast, NU's E & O department had the same information (the victims' allegations, the discovery from the State Court proceedings, and Norton's version of Chicago Title's role in the events) and was able to analyze coverage under that separate policy by late 2007." (SJ Order at 79-80.) It is clear "[n]o reasonable jury could find that NU lacked a factual basis to analyze FNF's claim under the terms of the FIB policy." (<i>Id.</i> at 80; <i>see also</i> Reconsideration Order at 8.)</p> <p>Additionally, Mr. Felton's opinion that formal proofs of loss are required for an employee dishonesty claim due to defamation concerns is unwarranted because "there is simply no evidence to support [the] opinion." (<i>Daubert</i> Ruling at 5.)</p> <p>Finally, as for Mr. Felton's opinion that Plaintiffs' changes to the proofs of loss made it difficult to complete an investigation, "[t]he actual facts expose the fallacy of this argument." (SJ Order at 81.) Indeed, "[a]ll NU had to do to begin to determine the amount of loss was start with one victim and analyze the evidence according to the actual terms of the FIB policy . . . Any one or two of the First Wave settlement</p>

1 payments could have exhausted NU's
2 exposure under the \$15 million FIB
3 policy." (*Id.*) And Plaintiffs' "voluntary
4 reduction of the amount claimed during
5 the litigation does more harm to NU's
6 position than to persuade the Court it
7 acted in good faith." (*Id.* at 82.)

8 NU's investigation and claims handling - Opinion Nos. 3, 5, and 12

9 NU's investigation, claims handling,
10 and conduct both before and during
11 litigation were consistent with sound
12 business practices and done in good
13 faith. (Felton Rebuttal Report at 20, 22,
14 40-41.) For example, Plaintiffs
15 suggestion that NU failed to conduct an
16 investigation during the Tolling
17 Agreement is false. (*Id.* at 22.) It was
18 Plaintiffs' failure to provide NU with a
19 proof of loss as required by the policy
20 that prevented NU from undertaking a
21 full investigation during the Tolling
22 Agreement. (*Id.* at 22-23.) NU still,
23 however, conducted an investigation
24 during the period consisting of intake
25 and digestion of Plaintiffs' thousands of
26 pages of material. (*Id.* at 22.)

27 "[T]he totality of circumstances shows
28 that NU unreasonably and in bad faith
withheld payment from its insured[s]." (SJ Order at 85.) "By 2007 or 2008, [Plaintiffs] had given NU sufficient information to conduct an investigation and make a coverage determination. NU's after-the-fact explanations do not excuse its clear breach of its basic obligations towards its insured[s]." (*Id.*; see also Reconsideration Order at 8 (denying motion to reconsider bad faith ruling).)

29 Plaintiffs' Proofs of Loss – Opinion Nos. 6, 9, and 11

30 The Proofs of Loss that Plaintiffs
31 submitted to NU in 2008 and, then
32 amended in 2009, were insufficient and
33 did not rise to the standards of making
34 or substantiating a claim for a loss
35 covered by the FIB. (Felton Rebuttal
36 Report at 27-28, 32-33.) Because the

37 Mr. Felton's "formal proof of loss
38 opinion", namely, "that an insurance
company does not have a duty to
investigate *until* the insured submits a
'properly executed proof-of-loss' form
is inadmissible because it "contradicts
California law." (*Daubert* Ruling at 5.)

1 Proofs of Loss were insufficient, NU
2 was not able to investigate the claim or
3 issue a coverage decision, and is entitled
4 to continue investigating Plaintiffs'
5 claims during this litigation. (*Id.*)

Under California law, a proof of loss is
simply “[a]ny evidence or
documentation . . . that provides any
evidence of the claim and that
reasonably supports the magnitude or
the amount of the claimed loss.” (*Id.*)

6 NU did not need a sworn proof of loss
7 “to begin its investigation, which
8 includes reading the information the
9 insured provided and considering
10 potential bases for coverage under the
11 FIB.” (SJ Order at 77.)
12 “[O]verwhelming” evidence shows that
13 Plaintiffs satisfied their obligation by
14 providing original and revised proofs of
15 loss, and all the at-issue escrows,
16 pleadings, and discovery from the
17 underlying litigation. (*Id.* at 65-68, 78-
18 79, 81-82.)

15 The reasonableness of NU’s refusal to mediate in May/July, 2008 – Opinion Nos.
16 7-8

17 NU showed no bad faith in rejecting
18 mediation in June 2008, before this
19 action was filed, because Plaintiffs’
20 mediation request was a strategic ploy
21 to force NU into a premature settlement
22 without providing sufficient proofs of
23 loss. (Felton Rebuttal Report at 31-32.)
24 Without proofs of loss, Plaintiffs were
25 in breach of the FIB and NU’s full
26 investigation was not required. (*Id.* at
27 31.) Without the ability to conduct a full
28 investigation, NU had no basis to
properly evaluate Plaintiffs’ claims at
the mediation. (*Id.*)

NU’s “pre-litigation attitude was
equally combative. In June 2008, NU
declined to participate in a mediation on
the ground that it did not have all the
facts. But NU already had sufficient
facts, and it was its own failure to
investigate that caused the problem;
therefore, this excuse was a sham.” (SJ
Order at 83.)

NU's classification of the claim only as "employee dishonesty" – Opinion No. 10

NU acted properly in classifying Plaintiffs' claim as one for employee dishonesty. (Felton Rebuttal Report at 34-36.) In particular, when possible defamation issues are apparent, as they were in this case, it is best practices to classify the claim as employee dishonesty. (*Id.* at 34.) Further, all of the allegations related to Forgery dealt with Ms. Nieto, Mr. Godwin, and Mr. Gainor, so these Forgery acts "would be associated with employee dishonesty and therefore inclusive under the peril." (*Id.* at 35.)

Mr. Felton's opinion concerning defamation is unwarranted because "there is simply no evidence to support [the] opinion." (*Daubert* Ruling at 5.) Moreover, insurance companies have an absolute right under California law to report alleged fraud. (*Id.* at 6.)

NU's FIB claims adjustor, Mark Wolin, "cannot explain why he treated the claim only as one for Employee Dishonesty and ignored the other Insuring Agreements. When asked at his deposition why he did not indicate that FNF listed other types of coverage, Wolin said, 'I'm not sure I know the answer to that.' The absence of any explanation confirms NU's error. On this record, the oversight is wholly unacceptable." (SJ Order at 70.)

The applicability of the genuine dispute doctrine – Opinion No. 11

NU did not act in bad faith because there are genuine disputes concerning: (1) coverage for certain escrow transactions; (2) whether the claims constitute a direct loss; (3) whether employee dishonesty affects coverage; and (4) the timing of discovery under the FIB. (Felton Rebuttal Report at 37.)

NU cannot rely on the genuine dispute doctrine "because it did not adequately or promptly investigate [Plaintiffs'] claim for Forgery benefits." (SJ Order at 73; *see also* Reconsideration Order at 8.) Additionally, NU's "coverage position was unreasonable because it was based on assumptions" (SJ Order at 74) and, in any event, "the Court rejected NU's interpretation of the contract terms that might have excused its performance." (*Id.* at 73.)

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The Forgery Insuring Agreement covered Plaintiffs for transferring, paying, or delivering “any funds or Property” based on forged documents. (*Id.* at 18.) Because Plaintiffs relied on forged documents in closing the escrows, Plaintiffs have “satisfied the direct loss element.” (*Id.*) Thus, Plaintiffs’ loss, including its “third-party settlement[s]”, are covered. (*Id.* at 18-19.)

Employee dishonesty is irrelevant because Plaintiffs are entitled to judgment as a matter of law under the FIB’s Forgery Insuring Agreement. (*Id.* at 47-48, 56-57.)

Equal bargaining power – Opinion No. 1

NU and Plaintiffs had equal bargaining power when negotiating the FIB, among other polices, and the FIB was a mutually agreed to contract. (Felton Rebuttal Report at 10-11.)

This opinion related to the interpretation of the phrase “Legal Department” from the FIB, particularly whether certain escrow claim attorneys were within Plaintiffs’ Legal Department. The Court found that the attorneys fell within the Legal Department, as NU advanced. But, the issue as a whole is no longer relevant because the Court granted Plaintiffs judgment as a matter of law under the FIB’s Forgery Insuring Agreement, and because the issue of whether Plaintiffs’ Legal Department “discovered” employee dishonesty or fraud was not triggered by the Kaplan and Medhi transactions, neither of which involved the type of loss covered by the FIB. (SJ Order at 47-51, 56-57.)

On the job training – Opinion No. 4

Plaintiffs suggest NU failed to issue a timely coverage opinion because NU does not have a claims manual for complex FIB claims and its adjusters lack formal training. (Felton Rebuttal Report at 21.) NU has a sound claims handling practice despite the lack of a claims manual. (*Id.* at 20.) In particular, all FIB claims involve the same fundamentals and adjusters address the claims over a continuing process. (*Id.* at 20-21.) Further, in general, the FIB policy terms and local regulations are enough to ensure the timely adjustment of a claim. (*Id.* at 21.)

The Court did not directly address this opinion in its *Daubert*, summary judgment, or reconsideration rulings.

CERTIFICATE OF SERVICE

Fidelity National, et al. v. National Union, et al.

Case No.: 3:09-cv-00140-GPC-KSC

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 801 S. Figueroa Street, 19th Floor, Los Angeles, California 90017-5556. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On May 28, 2015, I served the following document(s):

**JOINT MOTION REGARDING DEFENDANT'S MOTION FOR
LEAVE TO SUBSTITUTE AN EXPERT WITNESS FOR AN
UNAVAILABLE EXPERT WITNESS**

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

☒ (BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on May 28, 2015, at Los Angeles, California.

/s/ Susan Koehler Sullivan
Susan Koehler Sullivan

SERVICE LIST

3:09-CV-00140-GPC-KSC

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